IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 2 Original

THE STATE OF ARKANSAS, Complainant,

vs.

THE STATE OF TENNESSEE, Defendant.

BRIEF AND ARGUMENT FOR THE STATE OF ARKANSAS ON EXCEPTIONS OF THE STATE OF TENNESSEE TO THE REPORT OF COMMISSIONERS APPOINTED TO RUN THE BOUNDARY LINE BETWEEN ARKANSAS AND TENNESSEE.

On March 4th, 1918, this Court handed down an opinion settling the legal principles to control the fixing of the boundary line between Arkansas and Tennessee. (Arkansas v. Tennessee, 246 U. S. 158).

On June 10th, 1918, the Court entered a decree appointing three Commissioners selected by the parties hereto and in that decree provided for the running of the boundary line in accordance with the previous opinion of the Court. (Arkansas v. Tennessee, 247 U. S. 461).

On May 24th, 1921, the Commission filed an exhaustive and detailed report, showing that it had explored every possible avenue for the ascertainment of the boundary line in accordance with the decree of this Court. This report comprises over five hundred printed pages, together with many maps, etc., and discloses the most extensive research, indefatigable effort, great care and consideration of the question referred to the Commissioners.

Two of the Commissioners, Messrs. Bailey and Barton, are experienced engineers, whereas one of the Commissioners, Mr. Van Deventer, selected by the State of Tennessee, is an able, careful and conscientious lawyer.

These Commissioners went to the *locus in quo* with a party of surveyors on October 21st, 1919, and remained in the field until December 13th, 1919, when they were driven away by high water (Rec., Mar. p. 2); they resumed operations in the field

on July 26th, 1920, and the primary survey was completed on September 20th, 1920.

While this primary survey (Exhibit "B") was being made and after it was made a vast amount of proof was taken and many records were examined, and after as careful and painstaking an investigation as it was humanly possible to make, the line was run "by courses and distances" (Rec., Mar. p. 2), as set out in Exhibit "A" (Rec., top pp. 7-8).

The State of Arkansas was satisfied with the report and there was some delay in the printing of that report because the State of Tennessee refused to file exceptions until the report was printed. To bring this matter to an end the State of Arkansas paid for the printing of the report ($3,150.00) and thereupon the State of Tennessee filed exceptions, which we will now notice.

I.

The first exception is based on the erroneous idea that the decree of this Court contemplated that the Commissioners should not attempt to locate the line until proofs had been submitted to it—

> "as to whether, under existing conditions it was possible to locate with reasonable certainty the main channel of commerce of 1876 as it existed at the time of the cut-off" (Exception, p. 2).

It is said by defendant that it was clearly "contemplated by the interlocutory degree of reference" that ability to locate the line was a condition precedent to any further step.

According to the defendant, the Commission should first have investigated whether the line could be located, and, after finding that fact, then proceed to locate it where it was found that the line ought to run. Of course, the decree of this Court involved the idea that if the Commission was unable to locate the line, it should not locate it. The Commission, however, was able to locate the line and did so.

In this first exception, interwoven with the above proposition is the statement that the Commission concluded the survey (Exhibit B) in September, 1920, and thereafter took proof, and the statement is made that this proof was taken "after the line had been agreed on."

The defendant labors under the erroneous impression that the completion of the survey in September, 1920, was an agreement by the Commission as to where the line ought to be run, whereas it was no such thing.

That survey was of the whole territory and it was with respect to this survey that much proof was introduced. Without the survey the proof would have been meaningless to the Commissioners. The survey, that is, Exhibit B, does not undertake to fix any line whatever. It is a complete engineering picture of the *locus in quo* and after the completion of this survey, proof was taken and proceedings had which finally resulted in the running of the line by the Commission.

The statements in this first exception as to the course of events is erroneous, but they are immaterial because if the Court appointed a Commission to run the line in accordance with the principles settled by this Court and the Commission did its duty in this behalf, the Report of the Commission would be confirmed.

II.

The second exception states that "several depositions were taken by the Commission without notice to parties or counsel." (Exceptions, p. 3).

There was no motion made to suppress any depositions and no motion now is made to have this Court ignore same.

The exception does not indicate the name of any witness whose deposition was so taken, but if the Court will take the trouble it will find from the record pages to which reference is made the names of these witnesses.

While the Commissioners were on the ground they went to the homes of some very aged persons familiar with the situation and got sworn statements from them. If the defendant did not want the Commission to consider these statements or if the defendant wished to cross-examine these witnesses, the matter should have been presented to the Commission for proper action. This was not done, but the defendant waited until the Commission made its report and then, for the first time, in general terms, makes complaint that the Commission had obtained the statements of certain persons in the immediate vicinity of the cut-off. Neither party was represented when these statements were obtained.

The Court will recall that the Commissioners were in the field, that is, in the territory involved, from July 26th, 1920, until September 4th, 1920. While in that territory they called on Mrs. V. C. Guffin, a woman 73 years of age, who had lived in that locality all her life, and got a sworn statement from her. She pointed out to the Commissioners what was known in that territory as Cotton Wood Point and topographic conditions as she recalled them (Rec., top pp. 190-191).

The Commission also obtained the statement of J. P. Perryman, J. G. Brizendine and Mrs. Osborn

(Rec., top pp. 191-195), with respect to certain landmarks and where the boats formerly ran. They simply established, identified or pointed out fixed points, etc. It seems rather late in the day for defendant to undertake to unhorse the report of the Commission because of these statements which could have been suppressed on motion, or liberty to cross-examine the witness been afforded the defendant had defendant indicated a desire to do so.

As a matter of fact, the Commissioners were well within their rights in obtaining the sworn statements of these disinterested parties with respect to matters more or less inconsequential and all of which matters were made the subject of proof, with witnesses examined and cross-examined.

III.

The third exception goes to the absence of certain maps which were before the Commission and were not filed in this Court.

Of these maps the Commission said:

> "As the maps in the foregoing list are a part of the records of the Supreme Court of Tennessee, your Commisssioners are unable to file them as exhibits." (Rec., Mar. p. 9)

When the desire of the defendant to have these maps before this Court was communicated to plaintiff's counsel the latter, as shown by this third ex-

ception, joined in an effort to have the maps before this Court and we understand that the same have been transmitted to the Clerk of this Court.

This ought not to be a cause for an exception to the Report, but should have been dealt with by proper proceedings to have the maps brought before this Court. These maps are now available, however, so this exception is without merit.

IV.

The fourth exception states that "the overwhelming preponderance of credible proof" shows that the line directed by this Court to be located "could not now be located with reasonable certainty" (Exceptions, p. 4).

This involves quite a detailed discussion of the evidence on which the Commission based its findings that it could locate the line and did locate it.

The Commission found that the Suter map, made from a steamboat reconnoisance in the fall of 1874, showed the line of navigation and the Commission said of this:

> "The line of navigation, as shown on the Suter map, we find is also supported by the testimony of pilots and others familiar with the river at that time" (Rec., Mar. p. 3).

It was stipulated by the parties hereto—

> "that there was no material change in the river from the time of this reconnoissance till

the cut-off, except in the concave side of bends where the usual erosions progressed, which did not change the relative position of channel and bank line" (Rec., Mar. p. 4).

The defendant calls attention to certain evidence which, in its opinion, shows that the finding of fact by the Commission was erroneous.

It would be practically impossible to review in detail all of the evidence on this point. In view of the finding of the Commission, which is supported by material evidence, and of the stipulation of the parties, we will first notice that evidence which the defendant says establishes that the line "could not now be located with reasonable certainty."

The first witness mentioned by defendant is J. H. Humphreys. He testified, in the case of State v. W. A. Cissna, to the making of a survey, and his evidence was that he had not attempted, in making the survey, to locate the river of 1876, just prior to the cut-off (Rec., Mar. p. 384; Mar. p. 394).

Major Humphreys made plain that his survey had no relation to that which this Commission was appointed to do. (Rec., top p. 260).

The next witness whose name is mentioned by defendant in this exception, is Mr. J. A. Green. Mr. Green expressed the opinion that the middle of the channel of commerce of the Mississippi River, as it existed prior to the cut-off, could not be

located with reasonable certainty (Rec., Mar. p. 654).

The next witness mentioned is Mr. G. J. McSpadden, a lawyer who represented his brother-in-law, H. W. Stockley, in litigation with W. A. Cissna over land in this territory (Rec., top p. 213). He told of his investigations of that territory while this litigation was pending and thereafter. He made a drawing which was exhibited with his evidence (Rec., Mar. p. 104), but later said of that drawing:

> "I drew that in discussing the matter with several gentlemen who were lawyers and no more competent as surveyors than I was. That map was not made for publication; it is not good enough." (Rec., top p. 394)

Singularly enough, he gave on that drawing what he believed "to be the proximate outline of the cut-off at the time it occurred" (Rec., Mar. p. 668).

Of the drawing by this estimable lawyer which defendant makes part of the record, Mr. McSpadden further said:

> "I had no idea that anybody would ever see that except the two or three gentlemen I was talking to." (Rec., Mar. p. 670)

This eminent and interested lawyer's opinion was that he did not believe it possible to locate the

main channel of the Mississippi River as it existed before the cut-off in 1876 (Rec., Mar. p. 677).

Mr. McSpadden, a much better lawyer than surveyor, gave his opinion of the Suter map, and while not controlling, is quite interesting:

> "Q. Don't you think a man on a steamboat with a steamboat reconnoissance, and having a compass, could get compass courses to those land marks?
>
> A. Beyond any question; there is no question about that.
>
> Q. Could he plat the channel from notes made of those courses?
>
> A. Beyond any question."
>
> (Rec., top pp. 403, 404)

No other witness is mentioned in this fourth exception, which merely asserts the impossibility of locating the line which the Commission says it has located.

There is a reference to a map exhibited at page 510, and an examination thereof shows the following to be descriptive thereof by the surveyor who made it:

> "Map showing center of the Mississippi River in 1823 surveyed by J. A. Green November, 1909."

There was abundant evidence that the middle of the main channel of the Mississippi River as

it ran just prior to the cut-off was easy to find. This line was found by the Commission. We do not feel that it is incumbent on us to point out all of this evidence. We content ourselves with a few references to the record to show that the statement of defendant is unwarranted.

Testimony of C. B. Bailey (Rec., Mar. p. 105, et seq.)

Testimony of W. A. Cissna:

"Q. How about the river in 1876?

A. I think that can be located very easily."

(Rec., top p. 116)

Testimony of W. W. West (Rec., Mar. pp. 156-158).

Testimony of J. A. Martin (Rec., Mar. p. 170):

Mr. Martin is a surveyor who surveyed this territory in 1904 and testified in the case of Tennessee v. Muncie Pulp Co., et al., and among other things was asked whether there would be any danger of making a mistake as to the river bank of 1876, and he answered:

"I don't think you could make any mistake at all." (Rec., Mar. p. 171)

Also see testimony of Vince Beard (Rec., Mar. p. 191, et seq.)

L. E. Patton, an old pilot and boat owner since 1869, testified that the navigable channel was along the dotted line on the Suter map (Rec., top p. 62).

On cross-examination the statement was made to him that the Suter map "was made merely from observations," as Col. Suter went down the river, and the witness stated:

> "It corresponded to my recollection of it. I had been around there since 1865."
>
> (Rec., Mar. p. 305)

F. W. Davis, who "steamboated up and down for years" on the Mississippi River prior to the cut-off (Rec., Mar. p. 2), examining the Suter map, pointed out the navigable channel.

> "I was around in there in 1874, before the cut-off. This is the way we used to come down, follow the dotted line and come down over here; we come down this way."
>
> (Rec., Mar. p. 4)

That was in 1875 and 1876 (Rec., Mar. p. 7).

W. P. Davis, 73 years of age, plied the river from St. Louis to Memphis and sometimes New Orleans in the early days about the time of the cut-off (Rec., top p. 46) and he pointed out the channel of navigation, indicating that steamboats followed the dotted line on the Suter map (Rec., Mar. p. 11).

He also pointed out the channel used by steamboats going down the river, as well as going up the river (Rec., Mar. p. 11).

A. C. Edmonds, 75 years old, who was born and reared in the vicinity of Dean's Island, pointed out the main channel of the river as it ran prior to the cut-off (Rec., top p. 50). He carefully examined Col. Suter's map and said:

> "It seems to me this line is drawn about like they run." (Rec., Mar. p. 21)

William P. Hall, 77 years of age, steamboat captain, who commenced to ply in this territory two years after the cut-off (Rec., Mar. p. 52), described topographic conditions, and—

J. A. Osborn, who went to this territory in 1872, described how the steamboats ran prior to 1874 (Rec., top p. 56-57). His attention was called to the Suter map and the dotted line indicating the navigable channel:

> "Q. Do you think that dotted line is approximately correct?
>
> A. Yes, I think it is approximately correct for the main channel of the river. Some boats run through here, through McKenzie."
>
> (Rec., top p. 61)

We do not feel called on to go through this enormous record and point out all the evidence con-

clusively establishing the ability of the Commission to do exactly what it did, to-wit, locate and define the navigable channel of the Mississippi River as it existed in 1876.

If there was not a word of evidence in the record except that which was offered by the defendant, the theory and insistence of the defendant from the inception of this litigation would be exploded.

Miss Lottie C. Burke was the daughter of C. C. Burke, a civil engineer who died in 1901 at the age of 86 (Rec., Mar. p. 645-646); in 1868 he made a survey of the Trigg tract (Rec., Mar. p. 647).

The defendant's contention has always been that there had been no caving on the east end of the Trigg tract since 1823 up to the date of the avulsion. This survey by Mr. Burke shows that in 1868 the river had caved back almost to the present east end of Centennial Island (Rec., 509).

This map shows the left bank of the river of 1868 averaging 300 yards from the left bank in 1877, so that, for the line as run by the Commission to be correct, it was only necessary that a very little caving be done in the meantime, that is, from the date of the Burke survey to the date of the avulsion—eight years.

The Commission pointed out in its report that this map completely disproves the claim of defendant "that there had been no considerable erosions on the north and east line of the Trigg tract

and that at the time of the cut-off it contained over 1,300 acres'' (Rec., Mar. p. 11), and the Report continues:

> ''The fact is, as shown by said Burke map, that as far back as 1868, eight years before the cut-off, this tract contained by actual survey, only 934.21 acres and there was active caving along the entire front for eight years before the cut-off, which certainly reduced this area very materially. This map and certificate disprove a large volume of testimony as to the distance of the northeast line of the Trigg tract, as it was just before the cut-off, from the east end of Centennial Island, as it was immediately after the cut-off.'' (Rec., Mar. p. 12)

V.

The fifth exception is devoted to an attack upon the Commission finally running the line approximately as shown on the Suter map.

It is devoutly to be wished that this Court will not fall into that confusion of thought which obviously hampers the learned counsel for defendant.

He erroneously states that the boundary line as run by the Commission ''was *based entirely* on what is known as the Suter reconnoissance map of 1874'' (Exceptions, p. 5).

The statement is unwarrantedly erroneous. While this is a very large record and has to do with mat-

ters that can only be fully understood by experts, by men who have gone over the ground, by surveyors who know the meaning of these maps, surveys, descriptions in deeds, etc., any one ought to be able to understand that the line as run was not "*based entirely*" on the Suter reconnoissance.

The Commission pointed out, with respect to this map, that, while it did not "purport to be strictly correct at all points as to latitude and longitude," still "from the methods employed there is no reason why it should not be relatively correct" (Rec., Mar. p. 2).

The Commission stated that the Suter reconnoissance was made by scientific observers who went over this part of the river four times "for the very purpose of making this kind of map and sketching their observations on the ground at the time," and that the Commission therefore regarded "the Suter map as documentary evidence" and the Commission found that the line of navigation, as shown on the Suter map, was "*supported by the testimony of pilots and others familiar with the river at that time*" (Rec., Mar. p. 3).

We might call attention to the following statement of the Commission in connection with its work:

> "Your Commission has spared no effort to secure maps and all evidence that will throw light on the channel of the river at the *locus in quo*, from its earliest history, down to the

> present time. Request was made of the Chief of Engineers of the United States Army and of the office of the Mississippi River Commission for all available maps and records of those officers, and search was made in the map section of the Congressional Library and in the Cossitt Library, at Memphis, Tennessee, for any additional maps." (Rec., Mar. p. 9)

The Commission found from the various maps and surveys *"and from a careful examination of the ground"* that the east end of Centennial Island had not caved during the process of the avulsion (Mar. p. 12), and when this Court examines those things which the Commission examined, commencing with publications relative to this territory as early as 1806 (Mar. p. 10), it will be seen that the statement of the learned counsel for defendant, above noticed, is hopelessly erroneous.

In making this exception the defendant says that the middle of the main channel of the Mississippi River just prior to the cut-off is, on the Suter map, "indicated only in a general way" and this is followed by the further statement of defendant's learned counsel:

> "(Commissioners' Report, Page 2, admission of Commissioners that if it had not laid out the Suter line 'We have proceeded on an entirely wrong theory')."

There is no such statement in the Report of the Commission. The implication from the above,

which is cited by defendant's learned counsel to support his statement, is that if the Commission "had not laid out the Suter line," the Commission admittedly had "proceeded on an entirely wrong theory."

We find difficulty in conjecturing why this erroneous statement is made. Following the statement is a reference to Page 370 of the Record.

There is no excuse for a misunderstanding of the circumstances attending the use of the words "on an entirely wrong theory" *by one of the Commissioners.* On March 24th, 1921, when the Commission had practically concluded its labors or was near a completion thereof, one of the Commissioners (Mr. Van Deventer), in a colloquy with counsel, stated that the Commission had acted on the theory "that the Suter line, indicating the thread of the main navigable channel, was substantially the line of 1876, that is, the thread of the main navigable channel fixed by the Supreme Court is substantially the thread of 1876. I expect you, gentlemen, have read the testimony of the old pilots on that subject. They all seem to agree that was substantially the line" (Rec., top p. 370).

The learned counsel for defendant interjected the statement that he did not admit the accuracy of the Suter map and this particular Commissioner said:

> "If the Suter line is not the line, then we have proceeded on an entirely wrong theory."
>
> (Rec., Mar. p. 621)

Again did counsel for defendant "deny the accuracy of the Suter map" and avowed that it did not "purport to be made according to instrument." The Commissioner, Mr. Van Deventer, replied:

> "We understand that, but does it not show approximately the old thread of the navigable channel of the river?" (Rec., Mar. p. 622)

Again defendant's counsel announced his contention that the Suter map was inaccurate and Mr. Van Deventer, the Commissioner, made the following statement:

> "It has been shown that Col. Suter, in laying out the river bank and laying out the thread of the main navigable channel, as I recall, went up and down the river four times—made two trips going and coming—then checked up as carefully as anybody could do from that kind of reconnoissance." (Rec., Mar. p. 622)

What actually occurred, therefore, was a statement by one of the Commissioners that the Suter map, whereon was indicated the navigable channel, was (in the light of "the testimony of the old pilots" and the whole evidence) found accurate or substantially accurate.

This fifth exception is divided into subdivisions, abounding only in the statement of the conclusions of counsel at war with the conclusions of the Commission, which were based on the most careful examination of the territory, the topographic

conditions, surveys made prior and subsequent to the Suter reconnoissance, and a most complete understanding of the pertinency of the evidence of those familiar with the river and land lines immediately preceding the cut-off of 1876.

Subdivision (a): The defendant's learned counsel says that "there was no way by which the so-called Suter line could be located with any reasonable certainty," and in support of this statement says that "the map was not an actual survey," and that the channel of the river "was not tied to any fixed point of land."

The Commisssion fully understood the Suter map and said that it merely regarded "the Suter map as documentary evidence," and that, in connection with studying this map, the Commission had examined the land and river lines, all available documentary evidence on the subject, had examined the report of Col. Suter "printed in the Annual Report of the Chief of Engineers of the United States Army, 1875, Part 2," the Mississippi River Commission's blue print of the Suter map (Rec., Mar. p. 9), the evidence of pilots and others, and concluded that "the only evidence superior to this would be a survey which tied the channel line to existing monuments on the banks at the time" (Rec., Mar. p. 3).

Subdivision (b) of this exception is but a reiteration of subdivision (a), just noticed, and expresses only the conclusion of defendant's counsel, at war with the Report of the Commission and conclu-

sive evidence to the contrary, that the navigable channel could not be located with reasonable certainty.

Subdivision (c) simply asserts that the Commission "admitted that Suter's map was inaccurate as to the channel of commerce," and this admission is said to repose in the fact that the Suter map showed the navigable channel to be on the west side of Island 39, whereas the Commission found that the boundary line should be placed on the east side of Island 39.

The defendant's counsel's omission to point out the evidence on which he relies to show an error on the part of the Commission makes it necessary that we point out, at least, some of the evidence on which the Commission based its conclusion that the navigable channel was east of Island 39.

Island 39 is that small island at the foot of Brandywine, and the Suter map shows the river between the Tennessee and the Arkansas shore with the channel of navigation through a little chute between Island 39 and Brandywine. At this point the river ran almost due south and the Commisssion concluded, in spite of the dotted line appearing on the Suter map at this trifling and inconsequential point, that the real channel of navigation *immediately before the cut-off* was to the east of Island 39. It did so on evidence, to some of which we will call this Court's attention.

One witness, a man 75 years old, testified that, while there was a chute "between 39 and the

Arkansas shore," the main channel "ran on the Tennessee side," that is, on the east side (Mar. p. 19).

Another witness, 77 years old, stated that the main channel was on "the east side of Brandywine and 39" (Rec., Mar. p. 23).

Another witness, who was on Brandywine Island at the time of the cut-off, going there in 1872 (Mar. p. 33), testified that after he moved there boats did not run "between 39 and Brandywine," because immediately preceding the cut-off "there was hardly any chute there of any size" (Mar. p. 37).

Another witness, 72 years of age, who, from 1869 was "a pilot and boat owner on the river" (Mar. p. 42), testified that in 1874 the navigable channel was not through the chute between 39 and Brandywine because "there had been some timber to cave down," and that this shifted the channel of 1876 "outside of that island and to the left thereof going down stream" (Mar. p. 46).

Another witness testified that Island 39 was in Arkansas and that title to that island was "traced to the grant from the State of Arkansas" (Mar. p. 25).

Another witness testified:

> "Q. You were asked about 39. I will ask you whether, from the time you first heard of that territory, it has been considered or gen-

erally known and understood that Island 39 was in Arkansas?

A. Yes, everybody said it was in Arkansas.

Q. The people who have lived on Island 39 have always, since you have known anything about it, claimed to be living in Arkansas?

A. Yes." (Rec., top p. 60)

There is a vast amount of evidence along the same lines and the Commission placed the navigable channel where witnesses who knew conditions as they existed immediately preceding the cut-off placed same, and this very objection by defendant points out that the Commission merely treated Suter's map as contemporaneous "documentary evidence," of a very high order, it is true, but not conclusive.

On this point the Commission stated:

> "At the foot of Brandywine, where Suter shows a line on each side of Island 39, we adopted the line on the east, as the United States Township Plats show that Island 39 was included in the public surveys of Arkansas, the old maps in 'The Navigator,' 'The Western Pilot,' 'The Western Navigator,' and 'Lloyd's' show that it lay against the Arkansas shore, and we can not find any proof to the contrary." (Rec., Mar. pp. 6-7)

Subdivision (d) advances the proposition that the Commission "admitted that the Suter map was no

guide through that part of the river which formerly ran between Island 37 and Arkansas" (Exceptions, p. 6).

This is true but only qualifiedly true. There has never been the slightest dispute in this case that, in the early days, the Mississippi River, passing around Dean's Island, ran in a northeasterly and then a northwesterly direction to Shawnee Landing, and then in a southwesterly direction until it reached Devil's Elbow, after which point its course is immaterial to this proposition. Between Island 37 and the main Tennessee shore was McKenzie Chute. There were thus two channels just prior to the cut-off, the old one following the northerly course of the river around Island 37, and the later one following McKenzie Chute.

When the cut-off took place both channels were abandoned by the river (Rec., Mar. p. 4).

In the absence of evidence pointed out by defendant on which Tennessee relies to show the error of the Commission, if error is intended to be imputed to it in this behalf, when dealing with the channel as it relates to Island 37, we are again handicapped, but will point out what a few of the witnesses said.

An old steamboat engineer testified:

> "When I was a boy steamboating, the main channel was around on the west side of Island 37." (Rec., Mar. p. 3)

He explained that the dotted line on the Suter map was followed in 1874 (Mar. p. 4).

Another very old steamboat man said that in coming down the river steamboats used McKenzie Chute, that is, the dotted line on the Suter map practically south of Island 37, whereas in going up the river they used the other channel—"ran around west of Island 37 next to the Arkansas shore" (Mar. p. 11). (Going up stream the effort is to avoid the current). The witness stated that "this dotted line" (meaning the Suter line) was "approximately correct for the down stream course of steamboats running around Dean's Island through the chute of 37" (Mar. p. 12). He explained that the inhabitants of Island 37 claimed title from Tennessee and paid taxes in Tennessee (Mar. p. 14).

Another witness stated that from 1872 to 1885 he was cutting timber on Brandywine and on Island 37 and that the main channel was "around north of 37, around by way of Shawnee Landing was the old channel," but that along about 1876 "sometimes the boats would run through there"—meaning McKenzie Chute (Mar. p. 40).

Another witness who was from 1869 "a pilot and boat owner on the river," said:

> "Q. This Suter's map is a good reproduction of the river at that time?
>
> A. Yes, I think so." (Mar. p. 48)

He explained that there were two channels around Island 37 but just before the cut-off the one most

used was McKenzie Chute, whereas the one around Island 37 was used "if we had business in there" (Mar. p. 48).

Another witness, born in 1849, was familiar with this territory and left Island 37 in 1869 (Mar. p. 54). He said there were two channels there—"they ran on both sides of Island 37" (Mar. p. 57)—and that what particular channel was used "depended on the stage of the water. In high stages they went up around Island 37" (Mar. p. 58).

Another witness explained that there had always been two channels around Island 37, saying of the course of steamboats: "At the time of the cut-off they ran on either side; they went by Shawnee Village" (Mar. p. 75).

We think we have pointed out enough to show that the Commission was entirely correct in believing that because of the existence of these two channels the Suter map was no guide at this point, as to the correct *boundary line* between the States in 1874, and that it was therefore necessary for the Commission to depart from the Suter map and find as an independent fact the boundary line in accordance with the decree of this Court. The Suter map at this particular point—McKenzie Chute—dealt with the then most used navigable channel and that was not the boundary line. If so, Island 37 would have been in Arkansas, whereas, the line as run by the Commission places Island 37 in Tennessee, where it belongs and where its citizens

have always understood they lived, paying taxes in Tennessee, etc.

If there was error in this behalf, however, the error prejudiced Arkansas, not Tennessee.

VI.

The sixth exception challenges the statement of the Commission that the line of navigation, as shown on the Suter map, "is supported by the testimony of pilots and others familiar with the river at that time." It is said that "only a few pilots testified."

No evidence is pointed out in conflict with that on which the Commission based its finding and we can only tell from the name of the witness and the page citation what defendant relies on to overthrow the statement of the Commission.

Reference is made to "Davis, pp. 48, 49"; to "Patton, pp. 62, 207"; to "Osborn, p. 60"; and "Patton, p. 62."

At page 48 W. P. Davis testified that boats going down stream avoided getting too close to the bank of the river in bends, whereas in going up the river they would get in close to the bends to get out of the current (Mar. p. 14). He further said that going down stream boats didn't follow the "outside of the channel of the river" very closely—"they tried to get the benefit of the current coming down."

On page 49 this witness repeated that the effort of steamboat men was to take "advantage of the current almost every time" (Mar. p. 16), and up to Shawnee "the channel was close to the Arkansas shore (Mar. p. 16), and we find nothing in his evidence except that which is corroborative of the Commission's findings.

On page 62 there is to be found the evidence of L. E. Patton, whose attention was called to the navigable line as placed on the Suter map and he said: "That line there is about the way they ran along" (Mar. p. 43).

He said that just before the cut-off the chute of 37, that is, McKenzie Chute, was used, though boats went around by Shawnee Village—

> "It was a channel they used, but it was what we called a dead channel; this 37 was the real channel." (Mar. p. 44)

We do not see in this anything that can be treated as possibly unhorsing the finding of the Commission.

There is a reference made, as above pointed out, to page 207, and on that page is nothing pertinent stated, except Capt. W. P. Davis testified that he had never been up in that territory much until 1878—"I had been in there a few times on the boat but I didn't know much about it" (Mar. pp. 309-310).

Checking up the citation of "Osborn, p. 60," we find that Mr. J. A. Osborn's attention was called to the dotted line on the Suter map, commencing with Pecan Point and at this particular point he said that the map gave McKenzie Chute as the navigable channel, whereas the main channel was "around north of 37, around by way of Shawnee Landing was the old channel" (Mar. p. 40). (We thought everybody was agreed on this proposition). The witness further said:

> "The boats could come around through McKenzie Chute, but most of them went around this way, around by way of Shawnee Landing." (Mar. p. 41)

In other words, this witness stated that which everybody familiar with this case must admit, to-wit: that the old or main channel formerly ran around to the north of 37 but at the time of Suter's reconnoissance the most used channel was McKenzie Chute. The witness testified:

> "Q. After they got past the mouth of McKenzie Chute how about the line on that map?
>
> A. It is pretty near right; they could run either way, either side." (Mar. p. 41)

We can find nothing in this evidence justifying reference to it as being in conflict with any finding of the Commission.

On page 62, to which defendant's counsel refers us for evidence that the Suter line was erroneous

in connection with the navigable channel around Island 39, we find that L. E. Patton stated that "commencing at Pecan Point and on down to the foot of Brandywine," the dotted line on the Suter map was correct (Mar. p. 43). He traced the course of the channel on down and testified:

> "Q. Would you think that this dotted line, then, represented the navigable channel, as near as you could get it, following it on down here?
>
> A. That is about right." (Mar. p. 44)

We earnestly submit that the Court should not even consider exceptions made in the form and manner as these are made, and certainly just the bald statement that "only a few pilots testified," and the designation of nothing to indicate that the Commission was in error in what it stated and found, raises no question for this Court's consideration.

VII.

The seventh exception challenges the statement of the Commission that the Suter map "showed a line on each side of 39."

This is unimportant even if erroneous, in the light of the evidence to which attention has been called.

The Suter map, as reproduced (Exhibit D, p. 506), shows a dotted line only on one side of that island. Undoubtedly the Commission saw these

two lines on the "map of Col. Suter printed in the annual Report of the Chief of Engineers of the United States Army, 1875, Part 2," and the statement is made that this Exhibit D, to which attention is called as the Suter map, is nothing but a blue print thereof "secured from the Mississippi River Commission" (Mar. p. 9).

The defendant argues that the dotted line on the **exhibited** Suter map made from the blue print so shows the line of navigation that Island 39 would be in Tennessee, whereas we have already shown that Island 39 is and always has been in Arkansas. The Commission was correct in saying that this island was included in the public surveys of Arkansas and that it was over against the Arkansas shore and that the proof was one way on this point (Mar. pp. 6-7).

The map attached to "The Navigator" of 1806 shows the conditions to be as the Commission found (Rec., 515). In fact, all of the old maps show the same thing (Rec. 517, *et seq.*)

In instructions published in "The Navigator" of 1808 it was said:

> "The navigator in taking the middle pass must take care to hug the left side of No. 38 and a bar adjoining, to avoid being driven against No. 39. The river at this place makes a sudden turn to the left, and is said to be the greatest bend between the Ohio and New Orleans. It is called the Devil's Elbow."
>
> (Rec., 526)

Of Island 39 it is said in "The Navigator" of 1814, that "the island is scarcely distinguishable from the main land" (Rec. 535).

The same statement is made in "The Navigator" of 1817 (Rec. 541); repeated in "The Navigator" of 1818 (Rec. 545).

The character of Island 39 and the way to navigate around same is set out in "The Western Pilot" of 1825 (Rec. 555).

In fact, all of these publications in the nature of instructions to navigators of the time, and especially "Conclins' River Guide" of 1855, describes the channel at this point so that the Commission could have had no excuse for making a mistake (Rec. 593).

Defendant's statement in this exception as to the Suter map, or at least a blue print thereof, as exhibited, was in direct conflict with the statement made in the fifth exception, to the effect that the Commission's finding "was based entirely" on that map.

Under this exception an effort is made to state the purpose of the Suter reconnoissance, and the statement as made is erroneous. The reconnoissance was not by men "simply in making an examination to find where river improvements were needed." The Commission thoroughly investigated all of the details of the Suter reconnoissance and had before it, among other things, the evidence of Captain E. E. Winslow, Captain of Engineers

United States Army Corps, stationed at Memphis (Mar. p. 80), who described how these reconnoissances were made:

> "We embark on a steamboat and tie up at different places and make such observations as they think necessary. They then re-embark and proceed down the river a certain distance and tie up again." (Mar. p. 90)

Capt. Winslow stated the purpose thereof:

> "Q. For what purpose and to obtain what information was that reconnoissance made?
>
> A. It was taken for the purpose of studying the channel and location of islands."
>
> (Mar. p. 91)

He described what the dotted line meant:

> "The line that was put on it was intended to show the channel of the river, that is the line of the deepest water." (Mar. p. 93)

Capt. Winslow had before him the map as part of the records of his office (Rec., top p. 83), and when the map was first produced he was asked what the dotted line represented and he answered:

> "That dotted line represents the channel of the river in the year 1874." (Mar. p. 86)

Col. Suter, now dead, testified in the case of State of Tennessee v. Muncie Pulp Co. et al., then

pending in the Tennessee Court, and it is true that he said that "the idea was to get some idea of the condition of the river and the portions of it needing improvements" (Mar. p. 238), and he explained how the width of the river was ascertained, to-wit: by the speed of the boat "which had been accurately gauged before the party started," and he said that when it was possible the party went ashore to get instructions and triangulations (Mar. p. 238).

With respect to longitude and latitude, he said this was taken from fixed points and:

> "It enabled the difference in the longitude and latitude to be determined approximately and the lengths were determined by this reconnoissance." (Mar. p. 239)

And it is said under this exception that the Commission has "conceded that this map was the best evidence it had as to where the middle of the channel of commerce was in 1876," but we do not find any such statement in the Commission's Report.

The Commission stated its belief—

> "that a body of scientific observers going four times over this par of the river for the very purpose of making this kind of map and sketching their observations on the ground at the time, have more faithfully preserved the evidence than any other source to which we have had access. We believe the only evidence superior to this would be a survey which tied

> the channel line to existing monuments on the banks at the time. We, therefore, regard the Suter map as documentary evidence. The line of navigation, as shown on the Suter map, we find is also supported by the testimony of pilots and others familiar with the river at that time."
>
> (Mar. p. 3)

In other words, counsel's statement implies that the map, in and of itself, was said to be the best evidence, whereas what was really said was that it more faithfully preserved the evidence than any other document to which attention had been called; that it was documentary evidence; that the conditions reflected on the map were supported by reliable and credible evidence.

The exception, however, at the conclusion thereof, seems to go only to the proposition that the Commission should have reported that it could not do that which it in fact did. The statement is made that the Commission "should have reported that there was no adequate evidence before it to ascertain and delineate the middle of the channel of commerce immediately prior to the cut-off" (Exceptions, p. 10), and concludes:

> "This defendant excepts to its action in failing so to do."

The conglomerate exception seems, therefore, only to be addressed to an objection by the defendant that the Commission ran any line at all, but we have not felt at liberty to pass over without notice statements therein made.

This action has pended too long and cost too much to permit the possibility of the facts not being fully before this Court.

VIII.

The eighth exception is a statement by defendant that a certain portion of the line as run by the Commission "runs through land that was in actual cultivation as a farm at the time of the avulsion, as is overwhelmingly shown by the documentary proof and testimony of witnesses."

There is not a single reference to the evidence of any witness; there is not a reference to any page of the record on which evidence supporting the statement could be found; "the documentary proof" which counsel had in mind is not identified or designated.

We are free to say that there was some evidence to this effect and there was a mass of evidence to the contrary, and we do not feel that our failure to review all of that evidence will be regarded with disfavor by this Court.

The exception simply invites Court and counsel to take an enormous printed record and analyze and weigh the evidence with respect to a small section of the line, that is, that portion of the line "between the meridians of longitude 90 deg. 4 min., and 90 deg. 5 min."

We think that if this Court will consider that exception at all the Court should give us an oppor-

tunity to analyze all of this evidence and specifically point it out, but we cannot get away from the idea that if the defendant's counsel is not willing to take the trouble to point out what he thinks justifies his assertion, we ought not to take the trouble to point out the evidence which overthrows his assertion.

It is said under this exception that "this portion of the Commission's boundary line conflicts with the decree of this Court," because the Court directed the Commission to locate the middle of the navigable channel of the river, which, of course, it did not do if it ran the line not in the river but over "land that was in actual cultivation."

Plaintiff readily agrees that the line was not correctly run if it does not designate the middle of the navigable channel of the Mississippi River, and this exception simply invites us to forage around and find out why the exceptor entertains the views expressed in the exception.

Until directed by this Court to the contrary we feel entitled to decline the invitation.

IX.

The ninth exception is in the nature of a request to the Court to issue to itself a roving commission and find out (1) whether assertions of counsel are warranted by a fair weighing of the evidence, and (2) if warranted, what effect same would have on the line as located by the Commission.

In the general exception, before subdivisions are taken up, it is said that John Trigg owned 1,300 acres of the original Huddleston Grant and the basis of the exception, set out in Subdivisions *a*, *b*, *c*, *d*, *e* and *f*, relates to (1) the size of the John Trigg farm, that is, whether it was 1,300 acres or less prior to the cut-off, (2) whether 1,000 acres of this Trigg farm went into the river when the cut-off took place, and (3) whether the line as run by the Commission, therefore, treated cultivated land on the Trigg farm as the middle of the river of 1876.

Many witnesses did say that the farm of John Trigg contained about 1,300 acres. The evidence of these witnesses is pointed out under Subdivision *a* of this particular exception.

We will notice the only evidence to which attention is called under this subdivision of Exception IX, at page 13:

(1) A. C. Edmonds, a farmer 75 years old, lived in this territory prior to the cut-off and he described to the Commission how he thought boats ran just prior to the cut-off (Mar. p. 19); he referred to the John Trigg tract as containing "1,000 or 1,200 acres in cultivation" (Mar. p. 314), and further:

> "Q. How do you know there were 1,000 acres in cultivation?
>
> A. I don't know for certain there was that much; it was a large plantation."
>
> (Mar. p. 314)

(2) L. E. Patton testified, at marginal pp. 305-306:

> "Q. You know that prior to the cut-off there was a little over 1,000 acres in cultivation?
>
> A. Well, it was wearing away on both sides. I don't know what the original claim was."

(3) O. K. Joplin's evidence is cited. He testified that he saw some land from the Trigg tract going into the river at the time of the cut-off (Mar. p. 436), and with respect to his recollection of the width of the river.

(4) H. W. Stockley testified that "800 or 900 acres" of the Trigg farm went into the river with the cut-off (Mar. p. 487).

(5) C. A. Stockley testified, on pages cited by defendant's counsel, with respect to his recollection of the width of the river in that neighborhood. He stated that between the Trig tract and the river and east of the Trigg tract there was a farm owned by Mrs. Walt (Mar. p. 495).

(6) E. W. Massey testified at the cited page that his idea was that there were 1,000 acres originally in the Trigg tract (Mar. p. 522), and he stated at the other cited page in connection with his evidence, that he would estimate that there was "a thousand or twelve hundred or thirteen hundred acres in cultivation at the time of the cut-off" (Mar. p. 529).

(7) Mr. G. J. McSpadden, brother-in-law of and attorney for Mr. H. W. Stockley in the case of Stockley v. Cissna, knew nothing about the facts except from hearsay, and he stated with respect to the amount of the Trigg land in cultivation: "The common report was about 1,200 acres" (Mar. p. 328).

(8) J. A. Green testified that the Trigg farm just before the cut-off, according to common report, "consisted of some 1,300 acres of land, and that the change made by the cut-off in the Mississippi River took away 1,000 acres of that Trigg tract" (Mar. p. 651).

(9) Mrs. Narcissa Trigg was asked as to the size of the Trigg farm prior to the cut-off and she answered:

"I reckon 1,300 acres" Mar. p. 694).

From the foregoing vague and general references to the Trigg farm, it is assumed by defendant's counsel that it necessarily contained 1,300 acres and that, if it did contain 1,300 acres, it would necessarily follow that the Commission did not run the line correctly.

This matter was discussed before the Commission and the learned counsel for defendant stated that he wanted the benefit of the evidence of Mrs. Trigg because—

"she states that she lived there in 1866 on this tract of land and that she visited it one

> year prior to the cut-off, and according to Mr. Sanford, she states there were 1,300 acres there in that tract, and that 1,000 acres went in the river at the time of the cut-off. I want to get the benefit of her testimony in the record."
>
> (Mar. p. 690)

One of the Commissioners very properly replied:

> "If you can get any testimony that will shift that line a mile or half a mile, this Commission is wide open to shift it. I don't know how intelligent and how fine a woman Mrs. Trigg is, but her idea of the size of her plantation before the cut-off would not hold against this map of Mr. Burke, who was on the ground."
>
> (Rec., top p. 407)

Mrs. Narcissa Trigg was thereafter examined and the best she could do was to say that she "reckoned" the farm contained 1,300 acres before the cut-off (Mar. p. 694).

It is frequently stated by defendant's counsel in this connection that Mr. Burke, in his report to the Chancery Court, said that the cut-off "has placed nearly 1,000 acres under the tide of the Mississippi River," and that in the decree of that Court a reference to the Trigg farm was made in the words: "a certain tract of about 1,300 acres."

C. C. Burke made a survey in March, 1868, of the Trigg farm. He was appointed to make that

survey and he made it. He was an accurate surveyor, so far as we know. The map resulting from his survey is to be found at page 509 of the Record. The scale of that map is one inch equals 10 chains. That map shows the size of the Trigg farm. This is a mere matter of mathematical calculation.

After the cut-off it contained 349½ acres; 305.75 acres were on one side of the new channel and 33.75 acres were on the other side of the new channel.

The Commission could hardly be criticised for accepting the Burke survey as far more accurate than the estimate of an elderly lady, however estimable, and of witnesses who in general terms referred to the Trigg farm as containing "about" 1,300 acres.

The Commission stated that it took the field notes of the survey made by Mr. Burke, which field notes appear at marginal page 638 of the Record, as better evidence than these mere estimates of witnesses. The Commission took this actual survey and therefrom said that "the theory that there had been no considerable erosions on the north and east lines of the Trigg tract and that at the time of the cut-off it contained over 1,300 acres is disproved" (Report, Mar. p. 11).

Curiously enough, the defendant, in some instances, treats the Burke survey and map based thereon as the law and the prophets, whereas, as occasion demands, the Burke map is treated as

more in the nature of a caricature of land and river lines.

For instance, under Subdivision *c* of Exception XII, it is said:

> "His map was prepared solely for the purpose of showing the location and boundaries of said tracts and the channel of the river, which had cut through the Trigg tract in 1876; that he was not attempting to locate any other lines with accuracy on said map, which had no latitude or longitude, or sectional lines thereon, is shown by the fact that he placed Island 37 west, instead of north of this tract."

If Mr. Burke located the Trigg tract and surveyed it and thereon showed its location and the boundaries thereof, together with the channel of the river which cut through this tract after his original survey, there is no difficulty, in trained surveyors, like two of the Commission, locating therefrom "other lands with accuracy," and the fact that he placed Island 37 west rather than north of the Trigg tract did not affect the accuracy of the survey of the Trigg tract itself. He was concerned with nothing else.

It is under this exception that the statement is made by defendant's learned counsel that at this point the line as located by the Commission is "approximately a mile west of the east line of the Trigg tract" (Exceptions, pp. 14-15).

The statement is wholly erroneous. If the Burke map (R. 509) is considered in connection with the line run by the Commission, it will be found that the longest distance west of the east line of the Trigg tract to the center of the channel of the river is an inappreciable distance in excess of half a mile, and at one point it is less than a quarter of a mile. This is demonstrable by mere mathematical calculation.

The portion of the line above Station 32 does not at any point run through what was cultivated land at the time of the cut-off, but the Commission was somewhat in doubt as to a short distance between Stations 32 and 33 for reasons explained in the Report. In other words, the terminus of the line at Station 32 was the middle of the navigable channel and in the absence of authentic data, the Commission connected this point with Station 33 as the most accurate way to get at the correct line, and in the Report said:

> "At the point of the cut-off the state line in the dead river, below the middle of the cut-off, remained fixed, while above this point the line, of course, continued to shift southward with the line of the river. We have, therefore, turned the line at this point, in the direction of the shortest distance to the present live channel." (Report, Mar. p. 5)

Under this ninth exception reference is made to "the Bateman tract of 155 acres."

The Court will find that tract delineated on the Humphreys survey between 90 deg. 4 min., 90 deg. 3 min., as being on the bank of the Mississippi River as it ran in 1823. The Commission found, and could have found nothing else, that the Mississippi River gradually wore away that land prior to the cut-off.

To establish that this is not the truth, there is cited the evidence of Mr. McSpadden, attorney, who stated that he had heard witnesses testify "that practically all of the 155 acres of the Bateman tract, or at least quite a large part of it, still lay between the Huddleston tract and the river on the east after the cut-off" (Mar. p. 335).

Attention is called, in this connection, by the defendant to Record page 271. On that page will be found the evidence of Mr. Humphreys that the Bateman tract was there before the cut-off (Mar. p. 432), and the only other reference is to Record page 300, on which it will be found that Mr. Stockley testified that "the Massey place went into the river with the cut-off" (Mar. p. 487). Whether the witness meant this particular 155 acres shown on the original survey or a portion thereof which may not have been gradually eaten away before the cut-off, we do not know.

The only pertinence of the reference to the Bateman tract, as set out on the Humphreys map, with respect to the river of 1876 must repose in the contention that the Bateman tract had not prior to the cut-off caved in or eroded and was in the same condition as in 1823.

Charles A. Stockley, brother of the plaintiff in Stockley v. Cissna, testified that prior to 1876 the Bateman tract "might have caved some" (Mar. p. 290).

The Court will find the Bateman tract laid out on the Humphreys map of 1823 between 90 deg. 4 min. and 90 deg. 3 min. against the curving Tennessee shore *as of that date,* which is marked in brown (Rec. 510). It lies just east of the tract marked "H. W. Stockley" on this 1823 map.

On December 23rd, 1834, G. B. Bateman filed an entry with respect to this 155 acres (Mar. p. 847), and in the entry book an effort was made to plat this claim (Mar. p. 848). It will be seen from the description that the point of beginning was the northeast corner of the Huddleston 2,000-acre entry on the bank of the Mississippi River and even in 1836, when the tract was surveyed, there had been material changes since the original survey. The description in the survey of entry starting at the Huddleston corner, as above, proceeds: "Thence up the *eastern chute of the river* known by the name of old river" (Rec., top p. 494).

The Humphreys map shows a curving line and a condition which supports the Commission's finding, corroborated by other evidence, that the river would necessarily eat into this Bateman tract and did so prior to the cut-off. A lake had formed south of the Bateman tract and a chute north thereof, with a river running in circular fashion on the northeast side of the tract, and its situation was

such that it must have eroded considerably prior to the cut-off. The Commission ran the line on this theory and in accordance with topographic conditions, personally examined by the Commission.

A comparison of the Suter map with the Humphreys map at this particular point will show that the enlargement of Dean's Island and the moving of the river into the Tennessee shore supports the finding of the Commission. In fact, the Commission could have concluded nothing else than it did conclude with respect to the line at this point.

So many references are made to the Humphrey's map that this Humphrey's survey should be explained.

Maj. Humphrey's' survey dealt with nothing on earth except the lines of 1823. He made no effort to locate the river as it ran in 1876:

> "Q. Have you undertaken to draw on the map the river of 1876?
>
> A. No, sir; I have not." (Mar. p. 384).

He expressly disclaimed any knowledge of the location of the river of 1876 (Top. p. 252).

He admitted that conditions had so materially changed that the starting point for his survey was, in 1876, under water (Mar. p. 407). The land lines had, therefore, altered.

Maj. Humphreys admitted that he could not have run the lines he actually ran had he been under-

taking it in 1875, that is, just prior to the cut-off (Mar. p. 408).

Land which he showed on his map as a result of the survey was pointed out to him and he testified:

> "Q. Now in order to make it perfectly plain, all this land in here has at one time been under the Mississippi River?
>
> A. Yes, sir." (Mar. p. 418).

Defendant's counsel in this connection refers to the deposition of J. A. Green and a map made by him. Mr. Green's map, so he said, "was copied from the Humphrey's map, but on a different scale" (Mar. p. 650).

It is very difficult for this Court to deal with the exceptions filed by defendant as the Court is without any assistance whatever from the Exceptor, but is left to work out the pertinency of references to first one tract and then another.

X.

In the tenth exception it is asserted that the Commission located the boundary east of Centennial Island and Island 37 "much further west" than was the main channel of commerce in 1876.

(Exceptions, p. 15).

There is no reference to the record to sustain this statement and in no subdivision under this

exception is there a single reference to the Record in this case.

Under Subdivision *a* it is said that the Trigg 131-acre tract was found by the Circuit Court of Appeals, Sixth Circuit, in the case of Stockley v. Cissna (119 Fed. 812), and by the Supreme Court of Tennessee, in State v. Muncie Pulp Co. et. al., (119 Tenn. 155) to have been washed away by the sudden change in the course of the river in 1876.

It is not pretended that the parties hereto are bound by that finding. This Court appointed a Commission to run the line as it directed. The Court did not direct the Commission to find out what some other Court had said in some other case and to follow such findings.

In Stockley v. Cissna, supra, the question was whether plaintiff had shown title to the land for which he sued. He sued for this 131 acres. The lower court held that plaintiff had not shown title because, after tracing title to W. W. Trigg, the plaintiff failed to connect Trigg's title with himself and Mr. Justice Lurton said:

> "The plaintiff has failed to show that he has acquired the title of John Trigg, which appears to be the only legal title to either the lands on the bank of the river, or the new-made land included in the 131-acre parcel once submerged, but now restored."
>
> Stockley v. Cissna, 119 Fed., 812; 56 C. C. A., 324, 338.

It is true, the Court said in referring to this 131-acre tract, that there was satisfactory evidence that the tract "was rapidly washed away by the sudden change in the course of the river in 1876," but no such question was involved in the case and the observation was merely in passing, as it were. To show the immateriality of all of this, it might be pointed out that the Court said, on re-hearing:

> "If the plaintiff failed to show such a legal title as would support an action of ejectment, it was the duty of the Court to instruct for the defendant; for it was a matter of no concern to the plaintiff whether the *locus in quo* was the property of the heirs of John Trigg, Mrs. Martha P. Smith, or of the defendant. If the plaintiff had failed to show title in himself, his case broke down, and that was the end of it." (Page 351).

We do not exactly understand Subdivision *b* of this exception (page 16). In this subdivision the statement is made that "the tract of 305.75 acres within red lines on the Humphrey's map," was declared by Judge Lurton to be within the State of Tennessee. The proposition is presented to the Court that this finding of fact is "strong evidence of the inaccuracy of the conclusion of the Commissioners on substantially the same evidence."

Even a reference to this particular tract in Stockley v. Cissna was incidental, but we respectfully submit that this exception invites us to go into the evidence *in other cases,* which counsel informs

us is substantially the same evidence as is to be found in this record, and then come back to this record and forage through it to find out on what evidence defendant relies to overturn the Report of the Commission.

In other words, we gravely greet the information furnished by defendant's counsel that "substantially the same evidence" presented to other courts was presented to the Commission and that conclusions reached by these other courts afford "strong evidence of the inaccuracy of the conclusion of the Commissioners."

We earnestly submit that no question is presented by this exception which should be noticed by the Court.

If the Court feels that the defendant has raised any question for its consideration on this record by assailing a finding of the Commission, without pointing out one word or line of evidence on which defendant relies to show the error of the Commission in this behalf, then we think we should be given opportunity to submit an analysis of the evidence to be found in this record on this subject.

We cannot conceive that the Court will harness us with the burden of first pointing out the evidence on which defendant presumptively relies to overturn the finding of the Commission, and then pointing out the evidence on which we rely to sustain the finding of the Commission.

We are not willing, except under instructions of this Court, to brief the evidence on a particular point when the defendant is unwilling to even refer to a single word or line of proof in this Record to sustain its attack upon the finding of the Commission.

We do not wish to appear indifferent about it and will gladly analyze this evidence if the Court thinks we ought to do it, but it seems preposterous that an exception, with two subdivisions relating thereto, should be presented and not one single record page pointed out.

We are not informed from the exceptions as to the materiality of the attack on the findings of the Commission with respect to these two tracts of land.

We are not informed of any evidence in this record sustaining a reference to these two tracts of land.

We could safely admit that there was "strong evidence" that the Commission erred, but we ought to be entitled to have that strong evidence pointed out to us and we could furnish, we believe, demonstration that the Commission did not err.

The exception simply states that around the east of Centennial Island and Island 37, the Commission ran a line "much further west than was the middle of the main channel of commerce in 1876."

How much further, we are not told; where the line ought to be, according to defendant's claim at this point, is not stated; the Court is just asked to explore a large record to find out whether the Exceptor's idea is a correct one and, if so, whether it is prejudiced.

XI.

The eleventh exception presumably relates to that portion of the boundary east of Centennial Island and Island 37, and in that exception, it is stated that the bounary as located by the Commission at this point is "absolutely wrong because it is too far west," and the predicate for this assertion seems to be the claim that the line as run went through a portion of the Trigg tract which was said to be in cultivation at the time of the avulsion.

We have already dealt with the Trigg tract and the alleged cultivation thereof.

The tentative line referred to in this exception was fixed in September, 1920, and the Burke map, introduced thereafter, April 15, 1921 (Mar. p. 645), absolutely confirmed that which the Commission had gotten from other sources.

The whole error of counsel for defendant in discussing the Trigg tract lies in the fact that more than a third of that tract was lost in erosions before the cut-off. This error was pointed out to learned counsel for defendant by one of the Commissioners during the proof-taking:

> "You are trying to prove that the Trigg tract just before the cut-off contained over 1,300 acres, when you have just offered the Burke map showing that as early as 1868 it contained only 934 acres, and all the testimony shows that the bank continued caving from that time until the cut-off occurred."
>
> (Mar. p. 660).

The learned counsel for the defendant labored under the misapprehension that the reference was to some other Trigg tract, but the Commissioners said to him:

> "I beg your pardon. This is the Trigg tract through which the cut-off went, as the map shows." (Mar. p. 660).

There was a road on Centennial Island which is the west line of the farm marked "Stockley" and it occupies exactly the same position to the 90 deg. 5 min. meridian on the map of the Commission, Exhibit B, as on the Mississippi River Commission Maps, Charts 18 and 19, and on the Green map, Exhibit 10 (a reproduction of the Humphrey's map), and all other authentic maps and surveys. So that there is no possibility of error in this behalf.

The repeated statement of counsel for defendant that at the time of the cut-off there were 1,300 acres in this tract and that 1,000 acres went into the river by the cut-off, is an erroneous statement. We have already shown that witnesses simply estimated the size of the tract at the time

of the cut-off and, while the Burke survey was made eight years before the cut-off, it was dealt with one year after the cut-off and the only material matter then being considered was what land was left, not what land was gone. The statement that 1,000 acres of this tract was lost in the cut-off is expressly an estimate and the amount lost was not material. The material thing was what was left with which the Court then had to deal in Nelson v. Trigg.

The Court, when dealing with this situation after the cut-off, did refer to that which went into the river as "about 1,000 acres" (Mar. p. 718).

The estimate or approximation of what went into the river in no way affects the integrity and accuracy of the survey, and the use of the word "about" clearly shows that it was an incidental estimate, having no bearing on the question then before the Court. The Court was concerned with the land with which it was dealing, and that was described by metes and bounds, based on a survey that could not have been inaccurate in view of the fact that it coincides with so many other surveys made both before and after the cut-off.

XII.

This exception (Pages 17-21) again submits that "at the time of the cut-off" the Trigg tract "contained about 1,300 acres," and asserts that "the actual survey disproves a large volume of testimony as to the distance of the northeast line of the

Trigg tract as it was just before the cut-off from the east end of Centennial Island and as it was immediately after the cut-off."

Under Subdivision *a* of this exception, it is said that Mr. Burke was directed "merely to survey and ascertain the boundary and acreage of the portions of the Trigg tract which were left after the cut-off and in existence in 1877."

The trouble with this statement is that the first survey was not made "after the cut-off." The map was made thereafter "as per survey made in March, 1868" (Mar. p. 646; Top p. 383).

Counsel for defendant seems not to understand that there were two surveys made by Burke of the Trigg tract; one, as above shown, and is marked on the map (Rec. 509), was "made in March, 1868"; after the cut-off it became necessary to survey that which was left and this was done, as shown on the map itself, "October 23, 24 and 25, 1877."

A survey made immediately before the cut-off and another made immediately after the cut-off which corresponds with every other prior and subsequent survey, surely will be treated as the Commission treated it, more accurate than the mere idle guess of persons familiar with the tract.

So it is obvious that defendant's counsel is entirely mistaken in believing that "Civil Engineer Burke was called upon in the Chancery Court of Shelby County merely to survey and ascertain the boundary and acreage of the portions of the Trigg tract which were left after the cut-off." He made a survey, as we have pointed out, *eight years before the cut-off and a resurvey was made necessary by the cut-off.*

In assailing this map there are but three pages of the Record referred to, to-wit: 387, 418 and 426.

At page 387 will be found the decree of the Court in Nelson v. Trigg (the case in which Burke was called upon to make the survey), and the incidental reference to 1,300 acres is as follows:

> "Portions of a certain tract of about 1,300 acres of land." (Mar. p. 655)

At page 418 there is a copy of this decree, and, of course, it contains exactly the words of the original decree from which it was copied—"portions of a certain tract of about 1,300 acres" (Mar. p. 714).

At page 426 is a copy of a deed in the chain of title flowing from this proceeding (Nelson v. Trigg), and that instrument follows the language of the decree—"portions of a certain tract of about 1,300 acres" (Mar. p. 728).

Now, if the defendant has any purpose in this repeated reference to "1,300 acres," it must be

that this Court is asked to hold that reference to the Trigg tract as being a tract containing "about 1,300 acres" should overthrow and unhorse the actual survey showing exactly how many acres were in that tract. References which are expressly approximation with respect to a matter purely incidental to the thing being dealt with are taken by defendant as showing that two actual surveys were erroneous.

The plain truth is that the Burke map, introduced by defendant, completely exploded the claim defendant has been making since it started litigation with respect to this territory more than twenty years ago.

Under Subdivision *b* of this exception it is said:

> "The said Burke map, in connection with his said report which accompanied the map, in the Chancery Court, shows that at the time of the avulsion there were at least thirteen hundred acres in the Trigg tract, and support, rather than contradict, the testimony of witnesses familiar with the tract to this effect."
>
> (Exceptions, p. 19)

It cannot escape the notice of the Court that under Subdivision *a* of this exception the statement is made that the Burke survey was merely to "ascertain the boundary and acreage of the portions of the Trigg tract after the cut-off and in existence in 1877."

However that may be, there is no reference to "the testimony of witnesses" in such form as enables us to find out what witnesses defendant believes establish either the error or the correctness of the Burke survey. "The said Burke map" shows that there were only 934 acres in the Trigg tract in 1868. This precise and accurate statement of the result of a scientific survey by a capable surveyor should be taken as true by the Court. Especially is this so when there is just a vague reference to "the testimony of witnesses familiar with the tract."

Under this subdivision of this exception there is reference to "Sheet No. 7, Government Survey, Exhibit E." No page reference is given but the Court will find that Sheet No. 7, Exhibit E, is the Mississippi River Commission map of 1890 (Rec. 508). There is nothing about that document in conflict with the findings of the Commission.

Under Subdivision *c* of this exception (and we are trying to deal with all that defendant urges against the Report of the Commission), it is said that—

> "There is nothing on the Burke map to indicate when the portion of the Trigg tract between the river boundary of 1868 and the east line of tracts remaining in 1877 disappeared."
>
> (Exceptions, p. 19)

This is followed by the statement that "said map conclusively shows that about one thousand acres of

the tract went into the river at the time of the cut-off, which would leave no basis for the theory that the eastern bank of the Trigg tract had caved gradually between 1868 and 1877" (Exceptions, p. 20).

The defendant still harps on the reference to "about one thousand acres" which went into the river. We have shown that this was an estimate and was quite inaccurate, but immaterial to the matter then before the Chancery Court. The only page reference given by the exceptor in this matter is the decree in Nelson v. Trigg, above noticed, and a deed following the language of that decree.

Subdivision *d* of this exception asserts that "from the nature of the northeast boundary of the Trigg tract there could not have been, and, according to the testimony of the witnesses, there was no appreciable caving prior to the cut-off" (Exceptions, p. 20).

We think the northeast boundary of this tract shows no such thing.

In support of this assertion reference is made to—

> "the finding of fact of the U. S. Circuit Court of Appeals and the Supreme Court of Tennessee that the 131-acre tract in the northeast part of the Trigg tract was a part of the one thousand acres which were washed into the river at the time of the cut-off, supports defendant's construction of the Burke map in connection

> with his report accompanying same and the testimony of numerous witnesses that said Trigg tract did contain around thirteen hundred acres at the time of the cut-off."
>
> (Exceptions, p. 21)

We do not feel that we should be called upon to deal with the argumentative statements as to the findings of certain courts with respect to this matter, but we say again that the finding of every court on earth that the Trigg tract "did contain around thirteen hundred acres at the time of the cut-off" would be immaterial here unless there was pointed out the evidence on which such courts based that finding, to the end that this Court might be able to know whether the finding was justified.

That the tract did not contain "around thirteen hundred acres," which language could only be used by one who was making an estimate himself, is shown by the two surveys made by Burke, which surveys came into this record at the instance and behest of the defendant and which surveys corroborate the conclusions reached by the Commission after every effort and inquiry to get at the truth.

The Court may feel that the general and vague references to this Trigg tract invite a search of the record with respect thereto and as this case has pended so long and ought now to be ended, we will do that which the exceptor failed to do—put the Court in possession of the facts with respect to this tract.

Simon Huddleston obtained 2,000 acres under an entry dated July 2nd, 1822 (Mar. p. 832).

Huddleston conveyed to Trigg this same land, on March 13th, 1837, excluding "five hundred acres" (Mar. p. 702).

In this deed Huddleston described the land conveyed as "fifteen hundred acres."

Twenty-four years thereafter Trigg described this property in his will as "containing thirteen hundred acres" (Mar. p. 710).

On May 7th, 1862, Trigg gave his daughter, Mrs. Stockley, 500 acres of this land "in what is called as Devil's Elbow" (Mar. p. 736).

In March, 1897, the Triggs conveyed the balance of the land to Stockley, describing it by the original metes and bounds used in the original Huddleston grant (Mar. p. 732).

In other words, the old Huddleston deed was simply copied.

The defendant proved that at the time of the cut-off "the common report" was that the Trigg place contained "about 1,200 acres" (Mar. p. 328).

An actual survey (Burke's) in 1868 showed that nearly one-half of the land had been eaten away by the river prior to 1868, yet we are told that "there was no appreciable caving prior to the cut-off."

The references made by defendant to the evidence relate, in large measure, to other Trigg tracts, if we understand these references.

Trigg owned a great deal of property on the river, north of McKenzie Chute (Green's Map, p. 510).

Trigg got these tracts by original grants (Mar. pp. 798, 800, 802, 806).

This property on Island 37 had no relation to the Huddleston tract and the scant references by counsel are too confusing to follow.

The defendant's claim as to more than 1,000 acres of cultivated land going into the river when the cut-off took place has reference to the original Huddleston tract and is disproven not only by the Burke survey and other evidence, but one of its own witnesses estimated the loss by the cut-off as "eight or nine hundred acres" (Mar. p. 487).

The particular subdivision of this exception, however (Exception XII, Sub. *d*) seems to be addressed to the insistence—

> "that there was no adequate evidence before the Commission to enable it to establish and delineate with reasonable certainty the middle of the main channel of commerce in 1876 prior to the cut-off." (Exceptions, p. 21)

There was no difficulty in doing this.

We might here notice the following inaccurate statements appearing under another exception (No. XV.):

> "Major Humphreys further testified that the banks of the river of 1876 are now a mere matter of conjecture, and that what might be taken for banks of the river are mere ridges and there was no evidence as far back as 1901 to enable anyone to say that these ridges were river banks." (Exceptions, p. 27)

Major Humphreys made no such statement.

He did say of a particular ridge between Campbell's Lake and a body of water next to the Arkansas shore:

> "I can't say that it looked to me like it might have been the permanent bank of the Mississippi River." (Mar. p. 403)

And as to another point:

> "Q. 26. How much higher is that ridge than the land immediately to the west of it?
>
> A. I don't know. There is a ridge to the west of it and then another ridge.
>
> Q. 27. I am not asking you about another ridge. I am asking you about this ridge. Is or is there not a distinct bank at the point 77 chains east of what you have marked on your map as the Tennessee bank of old river?
>
> A. There is a distinct ridge there, yes.

Q. 28. How much higher is that ridge, if you wish to call it a ridge—

A. It is a ridge, surely.

Q. Than the land immediately west of it?

A. I don't know how much higher it is. *It is distinctly higher, though.*"

(Mar. pp. 414-415)

These are the only record pages to which defendant refers.

Maj. Humphreys distinctly said he was not trying to locate the river of 1876 (Mar. p. 410). And he further said:

"Q. Your map and your testimony, and your survey, are addressed exclusively to the period between 1823 and 1830?

A. Except the lines shown in blue and red, which indicate what I found on the ground when I made the survey." (Mar. p. 420)

Maj. Humphreys admitted that except for the cut-off he could not have run his lines:

"Q. 10. You could not have run this line in the fall of 1875, could you?

A. I think not.

Q. 11. The survey which was made, only became possible by reason of the cut-off, whereby the water was diverted from the old

channel into the present channel. That is true, is it not?

A. Yes, the reformation of the ground there results from the cut-off and the changes in the river subsequent to the cut-off.

Q. 12. In other words, without the cut-off, you could not have run these lines?

A. No, I could not. If I did I would have had to establish points in the sand, as I understand. Personally I don't know anything about these things." (Mar. p. 408)

Maj. Humphreys, impliedly, therefore, said that he could have run the lines as they existed at the time of the cut-off but he was only trying to locate the lines as of 1823. That was the only thing he was employed to do.

XII.-a

This exception (erroneously numbered as XII) will be found at pages 22-25 of the defendant's exceptions to the Report.

It challenges the statement of the Commission that " 'there could have been no caving along the east end of Centennial Island during the process of the cut-off, or the period of readjustment. Physical conditions were against it' " (Exceptions, p. 22).

There are seven subdivisions under this exception and it is only under Subdivision *f* that there is a reference to any page of this Record.

Subdivision *a* relies on the Suter map as overturning the finding of the Commission, and the argument is made that the cut-off caused the water to withdraw from around Island 37 and through Chute 37 and run through the new made channel "at quite a greatly increased velocity, which had the effect of causing the eastern boundary of Centennial Island to cave, both at the time of the cut-off, and during the process of readjustment" (Exception, p. 22).

We are at times almost led to believe that defendant's learned counsel is wholly unfamiliar with the record and with topographic conditions.

Centennial Island was made by the cut-off. If the Court will look at the "survey of the Mississippi River, made under the direction of the Mississippi River Commission, Chart No. 18," "made in 1879-1880" (Rec. 513, Exhibit E 2), it will be seen that there was no possibility that the east bank of Centennial Island could have caved as a result of the cut-off. The cut-off was south of McKenzie Chute or Chute 37, around which one branch of the river ran prior to the cut-off. The recession of water from these two branches of the river could have had no effect on the east bank of Centennial Island.

The statement is made that "this was a convex, not a concave bank."

The land at this point which subsequently became Centennial Island after the cut-off could

hardly be claimed as a convex rather than a concave river bank, unless we are very much mixed up as to the meaning of those words. The river flowed around Dean's Island and until it struck Thomas' Landing due south of Dean's Island, the course of the river was southerly. It then hugged the Tennessee shore, running in a northerly direction until it divided at Island 37. At this point one channel went through McKenzie Chute, or Chute 37, and the other channel went on around Island 37—the two channels coming together at the west end of Island 37, but opposite Cottonwood Point (Exhibit D, Rec. 506).

The Arkansas shore line around Dean's Island to the separation of the channels at Island 37 was a bulging shore or bank line, and that is what we would understand a convex shore line to be. From a point directly south of the remote end of McGavock's Chute (above Dean's' Island), the Tennessee shore was in the nature of an inner face of an arched vault, and this is what we thought would be called a concave shore.

The water which had, after flowing around Dean's Island, made two channels when the southeast corner of Island 37 was struck, was by the cut-off diverted approximately across the property marked "Massey" on the Suter map (Rec. 506), and there was no reasonable possibility that north of the cut-off there could be any caving thereafter. There was no current to erode the shore.

It is statements such as are made by defendant in this connection that lead us to believe that defendant's learned counsel is quite confused with respect to topographic conditions.

The sole reliance in this behalf (Subdivision *a*) is the Suter map, which, as it suits counsel, is assailed because having nothing to do with land lines, and, as it suits counsel, is treated as infallible with respect to land lines.

If the Court will look at any one of the Mississippi River Commission's maps, based on surveys made in 1879 and 1880, it will be seen that it was reasonably to be expected that there would be no caving along the east end of Centennial Island when the cut-off took place or when the river flowed through a channel south thereof.

We might commend Mr. Justice Lurton's discussion of Centennial Island to the consideration of counsel:

> "The elbow cut-off from the eastern shore of the old channel by the Centennial cut-off constituted for a time an island, and has ever since been known as 'Centennial Island.' This island was originally separated from Island 37 by McKenzie's Chute, being the channel immediately after the cut-off in favor of the deeper and shorter channel formed by the Centennial cut-off, and shown in the map above, east of Island 37."
>
> (56 C. C. A., 328).

A correct understanding of where the river ran before the cut-off and where the cut-off took place makes wholly unnecessary to discuss the violent disturbance of the regimen of the river. It is very likely that there were some lively disturbances where the river was going. A state of repose very naturally existed in that vicinity from which the river so rudely departed.

We frankly confess to an inability to understand the second paragraph appearing on page 23 of the exceptions, with respect to "the shore lines of 1868 on the Burke map."

We are confused because at page 20 of the Exceptions it is explained that the Burke map indicates that there was "no basis for the theory that the eastern bank of the Trigg Tract had caved gradually between 1868 and 1877," and the statement at page 23 that nothing on this map indicates whether the recession of the east line of the Trigg Tract occurred prior to 1877 "or whether it occurred at the time of and immedately after the cut-off." In fact, we do not understand what counsel has in mind in referring to the "east side of Centennial Cut-off."

Centennial Cut-off was the new channel made from a point just south of Trigg's Landing and Brandywine Point, and the new channel made by the river ran almost directly west. It curves to the south very slightly (Sheet No. 7, Mississippi River Commission, Rec. 508).

The only land on "the east side of Centennial Cut-off" (not Centennial Island), is a towhead on the other side of the river and just south of Dean's Island.

Subdivision *b* of this exception is nothing more nor less than a repetition of the statement by counsel for defendant that prior to the cut-off there were 1,300 acres in the Trigg tract and "that 1,000 acres of the Trigg tract were washed into the river at the time of the cut-off."

We have already said more on this subject than we think the Court will appreciate.

Subdivision *c* of this exception states that there must have been caving along the east end of Centennial Island because there were findings by certain courts (naming them) "that the one hundred and thirty-one acre tract in the Northeast portion of the Trigg Tract was a part of the one thousand acres which went into the river at the time of the cut-off" (Exceptions, p. 24).

We are not favored even with a reference to the cases wherein it is supposed that other courts have made "the findings of fact" on which defendant relies (Exceptions, p. 24). We presume that the reference is to the ejectment case (Stockley v. Cissna) and State v. Muncie Pulp Co., reversed by this Court on questions of law (Cissna v. Tennessee, 246 U. S., 289).

The references by Mr. Justice Lurton to 131 acres in Stockley v. Cissna, are:

> "The Centennial Island tract, of 131 acres, is indicated by the lines marking off a tract of 131 acres on northwest corner of Centennial Island." (56 C. C. A., 331).

Also, in stating the case, he mentioned that the Huddleston Grant included "the 131-acre tract" which was involved in that ejectment suit.

Mr. Justice Lurton further said:

> "The plaintiff claims that this parcel, as plotted on the Humphrey map, was included within the grant of 1824 to Simon Huddleston, and in the deed of Huddleston to John Trigg of the 1,500 acres, forming the eastern end of the Huddleston grant."
>
> (56 C. C. A., 335).

The lower Court, in acting on defendant's motion in that case for a directed verdict, on the ground that plaintiff had not shown title, "treated as true that 131 acres of this Huddleston grant had gone into the river with the cut-off of 1876." Whether it had or had not was unimportant. The case went off on the failure of the plaintiff to deraign title from John Trigg. This 131 acres was claimed by the plaintiff in that case in the nature of an accretion.

Mr. Justice Lurton said:

> "There is no evidence that he has now or ever had any actual possession of any part of

> the 131-acre accretion, other than that constructive possession which results from his possession of other parts of the land included in the Allen deed. We shall assume for the purposes of this case that the plaintiff's possession of the 305-acre parcel was a constructive possession of the 131-acre parcel although the two tracts may be claimed by different titles." (56 C. C. A., 339).

There is nothing in either of the cases which we presume counsel for defendant had in mind which concluded the Commission from making that independent investigation of the facts which this Court directed.

The plaintiff here instituted this action because of litigation to which it was not a party and counsel for defendant simply refers to some other litigation to which this plaintiff was not a party and, without disclosing what evidence other courts had before them and without referring to any evidence this Court has before it, says that the Commission did not find the facts as these other courts found the facts.

Subdivision *d* of this exception says that the Commission's finding that there could have been no caving along the east end of Centennial Island during the process of the cut-off or immediately thereafter is overcome—

> "by the testimony that the Bateman Tract immediately east of the Trigg Tract was in

existence and went into the river at the time of the cut-off." (Exceptions, p. 24.)

There is not a reference to any page of the Record to which one can turn to find "the testimony" which defendant's counsel asserts establishes a certain fact.

We have already had a good deal to say about this Bateman Tract, but respectfully submit that we ought not to be called on to guess what "testimony" defendant has in mind and then discuss that "testimony," as well as other evidence in the case. In the first place, we might make a bad guess if we discussed the "testimony" which defendant thinks shows that the Bateman tract was unimpaired prior to the cut-off and went into the river at the time of the cut-off. It could well be fruitless, because defendant might justly say that it had in mind some other "testimony."

We assert that we have never seen exceptions to a finding of fact by a master or referee or a commission so presented that it is left to the Court and adversary counsel to find out exactly on what the exceptor relies.

Under Subdivision *e* of this exception there is not a reference to a witness, nor to a page of the record. There is just a repetition of the often stated claim of defendant that prior to the cut-off the Trigg tract contained "from 1,200 to 1,300 acres" and that "there had been no caving east

and northeast of the Trigg tract" until the cut-off.

These alleged facts are stated to be established "by the testimony of witnesses," but until this Court directs us to do so, we are not willing to search the mind of counsel for the defendant to find out what witnesses he is thinking about and then search the record to find out whether these witnesses support his assertion.

As we have sought to stress herein, this case ought to end and we are unwilling to spare any trouble to get the facts fully developed, but we do not feel that we should be required to deal with an exception which merely states that the findings by the Commission are "refuted and overcome" by "the testimony of witnesses," without any witness being named or any reference to the record to enable us to test the accuracy of the statement.

Subdivision *f* of this exception states that the Commission's finding that the cut-off caused no caving along the east end of Centennial Island is overcome and refuted—

> "by the testimony of witnesses that the east bank of Centennial Island is not now the bank of the river as it was prior to the cut-off."
>
> (Exceptions, p. 25).

We are given the benefit of two references to the record under this general statement.

The first reference is to page 299. On that page will be found the evidence of H. W. Stockley, testifying in Stockley v. Cissna. Mr. Stockley testified that he then owned a farm on the east end of Centennial Island (Mar. p. 484-485); that the "Chute of 37" was along "the high bank of Island 37;" that at the time of the cut-off "the old river" was east of the farm owned by him in 1901 (Mar. p. 485).

The Court will find from an examination of Green's reproduction of the Humphrey's map (Rec. 510), that on the east bank of the river of 1823 were two tracts marked "Trigg 152½" and "Trigg 37 acres." Mr. Stockley testified with respect to those tracts:

> "Q. I will ask you this question, do you mean to say that the land marked Trigg's 152 acres and Trigg's 37 acres were out of water at the time of the cut-off?
>
> A. No, they were not." (Mar. p. 488).

This means that prior to the cut-off the east side of Island 37 had gradually been washed away and has not even the remotest tendency to prove that after the cut-off the erosions in Island 37 continued.

Outside of referring to the evidence of H. W. Stockley, which we have noticed, there is a reference to page 306, which is the evidence of C. A. Stockley, given in the case of Cissna v. Tennessee.

"Q. Was the present east bank of Centennial Island *shown here on Humphrey's map,* along Stockley's field, the bank of the Mississippi River before the cut-off?

A. Oh, no." (Rec., Top. p. 306).

This but corroborates the claim that the plaintiff has always made, that the east bank of Island 37 in 1876 was not the east bank of Island 37 as shown on the Humphrey's map of 1823.

The Court will recall that reference has been made to an old road on the east bank of 37 at the time of the cut-off. The existence of that road at the time of the cut-off and up to the time C. A. Stockley testified in 1901, conclusively establishes that the withdrawal of the water around Island 37 left the bank unaffected.

Mr. Stockley on this point testified.

"Q. This old road was the left bank of the river of 1876, before the cut-off coming down stream, was it not?

A. I think it was; Island 37 was on the left hand side.

"Q. What was the left bank of the river before the cut-off, will you please point out on this map about where the left bank of the river ran?

A. This old road was the left bank coming down stream, and this the left bank of the river." (Mar. p. 499).

And further:

"Q. I will ask you if this is the remains of the original high bank of Island 37 at the present time?

A. Yes, sir; that was there before the cut-off.

"Q. Does that old river lie right where the public road crosses; I am speaking of the old river back from that public road going on 37, was that the Chute of 37 there just prior to the cut-off?

A. Yes, right where that road is."
(Mar. p. 502).

And also:

"Q. Does the road on 37 run along the bank of 37?

A. Yes, the road on 37 runs along on the high bank of 37." (Rec., Top. p. 309).

O. K. Joplin, brother-in-law of Stockley, testified in Stockley v. Cissna:

"Q. Has there been any caving on the east bank of what is known as Centennial Island since the cut-off?

A. The caving stopped on the head of Centennial Island, *within a few days after the cut-off.*" (Rec., Top p. 272)

The evidence of this witness was offered by defendant (Mar. p. 421) and the Commission adopted

his statement because it was in line with the statement of every witness who testified on the subject.

This Court is asked to say that the Commission was wrong in finding that a defendant's witness, familiar with the facts, told the truth.

Captain Joplin further testified:

> "Q. Is there an old road right along there?
>
> A. Yes, that is the original bank of Island 37 before the cut-off.
>
> "Q. Was this the left bank of the river in 1876?
>
> A. Yes, sir." (Mar. p. 481).

We could call attention to other evidence as to the east end of Centennial Island before the cut-off, but the foregoing ought to be sufficient.

Subdivision *g* of this exception, which challenges the finding that after the cut-off there was very little caving on the east end of Centennial Island, amounts to nothing except the statement of the insistence of the defendant that

> "the boundary line that was established in harmony with such a conclusion should be disregarded on the ground that there is no adequate evidence to justify the location of such a line with reasonable certainty."
>
> (Mar. p. 25).

The "conclusion" was the only conclusion that could have been reached with any sort of regard to the evidence and topographic conditions.

XIII.

This exception can be ignored because it has no pertinency to anything before the Court.

The Commission ran the line as directed by this Court to a point opposite the cut-off at Station 32. The Commission had nothing to do with any lines, land or river, above this point. At this point the Commission connected the line with the present line by running at right angle from Station 32 to Station 33—about 3,400 feet.

The Commission simply connected the terminus of the line run as ordered, with the present well known line between the States. A lack of such connection would simply make for confusion with respect to a short distance.

Tennessee is not prejudiced by the line as run and if that State wants to leave a short line (32-33) "up in the air," as it were, we do not object.

Another suit to run the line at this particular point is obviated, however, by confirming the Report. If the line be run from "A" (page 508) up the old river to Winberg Landing, Tennessee would gain a trifling amount of territory. The Commission simply connected the line with the Mississippi

River Commission Boundary line (Sheet 7, page 508).

The fact is that since the cut-off, land has been slowly built out on Dean's Island and following the old channel would have left a little piece of Dean's Island in Tennessee. This would have been awkward and foolish.

The effort of the Commission was to leave all of Dean's Island in Arkansas, where it belongs and to so connect the line directed to be run with the line above this point that continuity and certainty of boundary would be assured.

It is to be regretted that a trifle like this should be questioned. If Tennessee insists on the exception, however, it can (so far as plaintiff is concerned) be sustained and the line as run by the Commission in pursuance of the decree of the Court, be unaffected.

To make it clear: The Commission ran the line as this Court ordered it. There was a small segment between this line and the long recognized line above the place where the Commission was instructed to go. As a practical proposition, the Commission connected its line with the long-recognized line above.

To be plain about it, the exception is frivolous.

XIV.

This exception is more than frivolous. Complaint is made that the Commission drew a yellow line on a map made by Mr. Burke.

The Commission stated in its Report, with respect to the Burke map, that—

> "We show also on this map, shaded in yellow, for the convenience of the Court, the original outline of the Trigg tract."
>
> (Report, top p. 7)

The Court could sustain the exception, order the yellow line expunged, and neither help nor harm anybody.

XV.

This exception, with subdivisions, does nothing more nor less than reaffirm that the boundary line could not be ascertained "with reasonable certainty."

It is said that Maj. J. H. Humphreys testified in 1901—

> "that he could not in that year undertake to locate the channel as it existed in 1876, prior to the cut-off (Rec. p. 260; Exceptions, p. 27).

Even if true that Maj. Humphreys was not able to locate the channel as it existed in 1876, it would by no means follow that no one was able to locate it.

However, Maj. Humphreys did not so testify. If it necessarily followed that because Maj. Humphreys was not able to locate the line, nobody on earth could locate it, there is nothing in the record to justify the statement that Maj. Humphreys would have been unable to run the line.

Maj. Humphreys testified that the only job he had undertaken was to "construct a map showing accurately the Tennessee bank of the river as it was at the time those surveys were made about the year 1823" (Mar. p. 389).

He testified that between 1823 and 1876 such changes were made that his map was not intended to represent conditions as they existed just before the cut-off (Mar. p. 407, 408). He was asked whether he could, *on his map*, "mark the middle of the river of 1876," and he said he would not undertake to do it because his map was "*not drawn with a view to locating the middle of the river in* 1876" (Mar. p. 410).

The reference in the exception is to this evidence.

The difference between a statement by a surveyor that he would not undertake to mark the middle of the river of 1876 on a map which he had prepared to portray the river of 1823, and a statement by a surveyor that the middle of the river of 1876 could not be located by one seeking to do it, is reasonably obvious.

Under this exception it is said that Mr. Green "testified that it was not possible for any sur-

veyor" to locate the channel of 1876. Mr. Green so testified (Mar. p. 654).

Mr. Green's opinion that the line could not be located is not conclusive. His opinion was based on an erroneous conception of what would constitute the middle of the navigable channel of the river. His idea was, and he was addressing himself to this proposition, that the admitted changes in the channel of commerce would make the line a shifting line:

> "Q. The channel of commerce changes even according to the seasons of the year—I mean the width of the river changes?
>
> A. Yes." (Mar. p. 654)

Mr. C. B. Bailey testified in the case of Stockley v. Cissna that the river as it ran in 1876 could be located by the size of the timber, character of the soil (Mar. pp. 105, 109), and the banks were there to speak for themselves—

> "Q. What is the condition of the country where you stated to the jury was the left bank of the river in 1876?
>
> A. The greater part of it was a bank from fifteen to twenty feet in height."
>
> (Mar. p. 110)

Mr. W. A. Cissna testified with respect to that bank which it is said could not be located:

"Q. Now, what is the nature of the left bank of 1876 of old river?

A. A decided bank.

Q. Is it a bluff bank as compared with the other bank?

A. Yes, sir." (Top p. 112)

And with respect to the opposite bank, Mr. Cissna described the timber—

"Q. That timber on the right bank of 1876 is larger than the timber in the bed?

A. Yes, sir." (Mar. p. 145)

Mr. Cissna's attention was called to the right bank of the river of 1823 on the Humphreys map and his evidence was:

"Q. Where is it in reference to the right bank of the river in 1876?

A. Very much further east.

Q. How much further?

A. Well, I should think a half mile."
(Mar. p. 149)

And of the right bank prior to the cut-off he said:

"I think the right bank can be located; it is very perceptible." (Mar. p. 149)

W. W. West testified that the bank of 1876, as distinguished from the bank of 1823, could readily be located (Mar. p. 157).

He was able to point out even on the Humphreys map the right bank of the river of 1876 (Mar. p. 158), and explained that the timber growth indicated where the river was in 1876 (Mar. p. 159).

James A. Martin, a surveyor, testified in State of Tennessee v. Muncie Pulp Co., et al., that he had no trouble in locating the banks of the river of 1876 (Mar. pp. 166, 169, 170).

Mr. Martin said that he thought there was no chance to make a mistake as to locating the river of 1876 from topographic conditions—size of timber, character of soil, etc.:

> "There is no necessity for making any mistake that I could see; the distance, the difference in the size of the timber, and the difference in the elevation of the bank would indicate the bank there very plainly."
>
> (Mar. p. 171)

Mr. Vince Beard testified to the timber growth which indicated the bank of 1876 (Mar. p. 190), and described the difference in elevation between the river bed of 1876 and the bank of the river of that year (Mar. p. 191). He described the continuity of the bank:

"39. Does this bank which you have spoken of maintain itself the same height all along from the northern to the southern part?

A. Just about all the way along; yes, sir."

(Mar. p. 201)

There was so much evidence as to an ability to locate the river of 1876, documentary and otherwise, that we do not feel that a demand is made on us to cite all of that evidence by the erroneous statement of defendant's counsel that Maj. Humphreys said he could not locate it, nor by the opinion of Mr. Green that it could not be located.

Under this exception there is cited a finding of the Tennessee Court on the evidence then before it, that the existence of the bank "considerably west of the original Dean's Island bank" was largely a matter of speculation.

A finding by the Tennessee Court on evidence that was before it could not help this Court unless it was known what evidence was before the Tennessee Court which resulted in that finding. There is nothing in the record tending to show what evidence the Tennessee Court had before it. It is absolutely certain that the evidence which was before the Commission in this case was not before the Tennessee Court—its finding, therefore, may have been right or wrong on the record that Court was considering, but it throws no light on the matter now before this Court.

XVI.

This exception simply reiterates the oft-expressed opinion of defendant's counsel that "there is not in the record accompanying the report of the Commissioners sufficient evidence to locate with reasonable certainty the main channel of navigation of the river between the points indicated in the decree of this Court" (Exceptions, p. 28).

There was before the Commission sufficient evidence to enable it to locate with reasonable certainty the main channel of navigation of the river of 1876. We have heretofore pointed out much, but by no means all, of that evidence. In the exception there is not a single reference to a page of the record. As we have shown the unfamiliarity of the defendant's learned counsel with the record, we take it that our statement, supported by references hereinbefore made, will at least be as effective as a contrary statement supported by no reference whatever.

XVII.

This exception contains merely the statement of defendant's learned counsel that the line established by the Commissioners "could not possibly have been the middle of the channel of commerce at several points at the date of the avulsion." (Exceptions, p. 29).

Not a single reference is made to the Record to sustain this assertion and our reply to it is that

learned counsel for defendant has reached an erroneous conclusion.

Thus again is the Court invited to take a tremendous record and find out for itself whether the Commission had before it enough evidence, in the light of the Commission''s observations and researches, to run the line.

We could safely admit that counsel for the defendant really believes that he has arrived at a correct conclusion, but that would not affect the fact that the Commission, with better opportunities, arrived at a correct conclusion. In other words, his opinion is all that is stated in this exception.

XVIII.

This exception is a mere expression of opinion by the learned counsel for the defendant that the boundary line was not run by the Commission "in accordance with the decision of this Court and the decree of reference."

If it was not, the Report should be discarded.

There is no suggestion made in this exception as to wherein the Commission has violated the order of this Court. There is no reference to any feature of the decree of this Court which is said to have been violated. There is no reference to any page of the Record. The Commission says it undertook to run the line as this Court directed it to be run, and the defendant says it didn't do it.

The exception does not merit notice because of its generality and the studied failure to point out anything in the action of the Commission which is thought to be in collision with the decree of this Court.

XIX.

This exception simply states the opinion of defendant's counsel to be that "there was a plain disregard of the decree of this Court, in that the line was not located along the middle of the navigable channel," and the reference is to page 3, of the Report.

Presumptively this refers to identically the same matter as is dealt with under Exception XIII, which we have already noticed. We must, however, indulge in a presumption to find out what is in the mind of defendant's learned counsel in this behalf.

XX.

Under this exception it is said that the Commission admits that unless the Suter map was absolutely correct, it had "proceeded on an entirely wrong theory."

We have already pointed out in discussing Exception V, that this statement is not warranted.

It is under this exception that it is repeated so often that the repetition must have been merely to enlarge the exceptions, that the line could not be located "with any reasonable certainty."

To sustain this assertion there is not a single page of the Record cited. The only citation of the Record to be found in this exception is page 370, and when that page is read and understood it will be found that there was no such admission as is supposed to be thereon found.

It is stated fourteen times by defendant that the Commission could not locate the line with reasonable certainty.

> (Exceptions IV, p. 4; V. pp. 5, 6, 7; VI, p. 8; VII, p. 10; XII, p. 21; XIIa, p. 25; XV, p. 27; XVI, p. 28).

It is stated sixteen times that the Trigg tract contained 1,300 acres, of which about 1,000 acres were destroyed by the cut-off.

> (Exceptions, IX, pp. 11, 12, 13, 14, 14, 16; XI, p. 17, XII, p. 17, 19, 20; XIIa, p. 24).

The exceptions are made to cover more pages and appear formidable by this "padding" process of stating two propositions thirty times—frequently making the same statement two or three times on the same page.

The first proposition (inability to locate the line) becomes none the less a mere conclusion, even though it is advanced fourteen times; the second proposition is not robbed of inaccuracy by stating the same thing sixteen times.

MOTION AS TO COSTS

And now the plaintiff (State of Arkansas) moves the Court to tax the State of Tennessee with the costs of printing the report of the Commission to which it desired to except and that other costs be equally divided between the two States.

This seems to be the only fair disposition of the costs of this proceeding. The Commission did its work thoroughly; its report was acceptable to the State of Arkansas; the State of Arkansas was anxious that this proceeding be wound up and a final decree entered; the State of Tennessee objected to the report and forced on the State of Arkansas the unnecessary cost incident to the printing of this report, to-wit, $3,150.

Not a single exception is made that could have been seriously thought had merit, and the just and equitable thing would be to require Tennessee to reimburse Arkansas for the unnecessary cost of printing this report and, as relates to all other expenses, let the same be equally divided between the two States.

Respectfully submitted,

CARUTHERS EWING,
Solicitor for State of Arkansas

J. S. UTLEY,
Attorney-General of State of Arkansas.

EWING, KING & KING,
Of Counsel.